



Signed: May 29, 2008

*Leslie Tchaikovsky*

LESLIE TCHAIKOVSKY  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 07-41427 TG  
Chapter 13

MARK LYLE WADLEY and  
DENISE MARIE WADLEY,

Debtors.

MARK LYLE WADLEY and  
DENISE MARIE WADLEY,

A.P. No. 07-4158

Plaintiffs,

vs.

STEVEN L. JACOBS

Defendant.

**MEMORANDUM OF DECISION AFTER TRIAL**

In the above-captioned adversary proceeding, Plaintiffs Mark and Denise Wadley (the "Debtors") seek a judgment for damages against Defendant Steven Jacobs ("Jacobs"), their former bankruptcy counsel, in the amount of \$5,235.35 on grounds of legal malpractice. Having considered the evidence and argument presented at trial, the Court finds and concludes that, due to Jacobs' negligence, the Debtors have suffered damages in the amount of \$543. Judgment will be entered in favor of the Debtors in accordance with this decision.

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## SUMMARY OF FACTS

In January 2007, the Debtors contacted Jacobs about filing a bankruptcy petition. On January 13, 2007, they met with Jacobs at his San Leandro office<sup>1</sup> and paid him \$200 as a retention fee. At this meeting, Jacobs advised the Debtors to stop making payments to their creditors. He told them to gather required documents and bring them to his office along with a \$300 processing fee.<sup>2</sup>

Plaintiffs followed Jacobs' advice and stopped making payments to their creditors. However, for personal reasons and in order to accumulate sufficient cash to pay him the additional \$300, they did not return to Jacobs' office to proceed with the bankruptcy until March 27, 2007. A member of Jacobs' staff told the Debtors that they would receive a phone call when their bankruptcy forms had been prepared. An appointment would be made at that time for them to sign the bankruptcy forms. They were told that the forms would be completed and ready for their signatures in approximately two weeks.

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<sup>1</sup>Jacobs' primary law office is in San Leandro, California. It is staffed during normal business hours five days a week. He also operates five satellite offices where he meets with clients by appointment only. These offices are normally open only one day a week for two to three hours. The office is not staffed at other times although there is a general building receptionist who can refer clients to Jacobs' San Leandro office. Any telephone calls that are made to a satellite office are received in Jacobs' San Leandro office.

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<sup>2</sup>No evidence was presented that Jacobs warned the Debtors not to stop paying their creditors if they delayed filing for bankruptcy.

1 Exactly two weeks later, on April 10, 2007, the Debtors' car was  
2 repossessed. The Debtors had not yet received a phone call from  
3 Jacobs advising them that their bankruptcy forms were ready to be  
4 signed. Denise Wadley telephoned Jacobs' office and spoke with one  
5 of his employees. She told the employee that their car had been  
6 repossessed and that she needed to speak with Jacobs immediately.  
7 She was told that she needed an appointment to speak with him and  
8 that the next available appointment was one week later, on April 17,  
9 2007. An appointment was scheduled for that date.<sup>3</sup>

10 In the meantime, the Debtors were able to obtain the return of  
11 their car by borrowing sufficient funds from Mark Wadley's mother to  
12 pay off the balance due plus the towing fees and other repossession  
13 charges. When they met with Jacobs on April 17, he told them that,  
14 under the circumstances, there was nothing more than he could do for  
15 them with respect to the car. The Debtors were advised that Jacobs'  
16 office had not yet begun preparing their forms and that it would be  
17 two more weeks before they were ready to be signed.

18 Again, the Debtors did not hear back from Jacobs' office within  
19 two more weeks. On May 7, 2007, the IRS levied on funds in Debtors'  
20 bank accounts. As a result, Plaintiffs incurred several overdraft  
21 charges. On May 10, 2007, the Debtors contacted Jacobs' office for  
22 assistance in obtaining the release of this levy. They met with  
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24 <sup>3</sup>Jacobs' office manager testified that this was not the  
25 office's customary procedure. Normally, if a client advised  
26 someone in Jacobs' office that his car had been repossessed, an  
appointment would be scheduled the same day, a skeleton petition  
would be filed, and they were usually able to obtain a prompt  
release of the car.

1 Jacobs at his San Leandro office on the same day. While present at  
2 Jacobs' office, Mark Wadley telephoned the IRS and got the levy  
3 released. On the same day, Jacobs prepared and filed a skeleton  
4 petition for the Debtors. Due to his office's delay in filing their  
5 petition, Jacobs voluntarily refunded to the Debtors the \$500 that  
6 they had tendered to him for his services thus far. The balance of  
7 the required documents, including the Debtors' plan (the "Plan"),  
8 were not filed until June 4, 2007.

9 After the bankruptcy petition was filed, in June 2007, the IRS  
10 either levied on or purported to assert an offset against the  
11 Debtors' California state tax refund (the "State Tax Refund") to  
12 satisfy a portion of the Debtors' federal tax liability. The Debtors  
13 asked Jacobs' office to assist them in obtaining a release of these  
14 funds. Jacobs' office faxed a letter to the IRS requesting the  
15 return of the State Tax Refund.<sup>4</sup> The IRS declined to return the  
16 State Tax Refund. Nothing further was done to obtain its return.

17 On June 19, 2007, the Chapter 13 Trustee (the "Trustee") filed  
18 a motion asking the Court to review the reasonableness of Jacobs'  
19 fees under 11 U.S.C. § 329. The motion was scheduled for hearing on  
20 August 17, 2007. In the motion, the Trustee noted that a meeting of  
21 creditors was scheduled in the Debtors' case for June 14, 2007.  
22 Local Rule 3015-1(b)(1) required that notice of the Plan be given to  
23 creditors at least 25 days prior to this date. Because the Plan was  
24 not filed with the petition, the Debtors were required to provide

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26 <sup>4</sup>The evidence concerning this occurrence was somewhat confused  
as the date on the faxed letter, May 24, 2007, preceded the date of  
the IRS levy.

1 this notice. They failed to do so in time to permit the Plan to be  
2 recommended for confirmation on June 14, 2008.

3 The motion also stated that the Trustee did not receive copies  
4 of the Debtors' most recently filed federal tax return or 60 days of  
5 payment advices until June 12, 2007, two days before the meeting of  
6 creditors. The motion noted that, at the meeting of creditors, the  
7 Debtors testified that they had provided these documents to Jacobs'  
8 office three weeks prior to the meeting of creditors. As a result,  
9 she requested that Jacobs' fees be reduced by an additional \$300.

10 On July 11, 2007, the Court received a letter from the Debtors  
11 expressing their dissatisfaction with the service provided to them by  
12 Jacobs. In response, the Court issued an Order to Show Cause Re  
13 Disgorgement of Fees (the "OSC"), which it scheduled for hearing on  
14 the same date set for the Trustee's motion. The OSC required Jacobs  
15 to show why his fees should not be reduced by an amount greater than  
16 the \$300 reduction requested by the Trustee for the reasons stated in  
17 the Debtors' letter. Jacobs moved to withdraw as the Debtors'  
18 attorney on August 14, 2007 and agreed to accept any reduction in  
19 fees that the Court found appropriate.

20 The hearing on the OSC was rescheduled for September 24, 2007,  
21 at which time Jacobs' motion to withdraw as the Debtors' attorney was  
22 granted. At that hearing, Jacobs' counsel stated that Jacobs had  
23 voluntarily refunded all of his fees to the Debtors. The Court  
24 advised the Debtors that an adversary proceeding would be required if  
25 they wished to seek affirmative relief, such as damages.

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1 On October 3, 2007, the Debtors filed this adversary proceeding,  
2 seeking damages totaling \$5,235.35, consisting of: (1) the amount  
3 paid from funds borrowed from Mark Wadley's mother to obtain the  
4 return of the Debtors' car in the amount of \$3,313.35, (2) the amount  
5 of the State Tax Refund in the amount of \$1,379.00, (3) \$300.00 for  
6 phone calls made to the IRS to obtain a release of its pre-petition  
7 levy on the Debtors' bank account, and (4) \$243.00 in overdraft  
8 charges incurred as a result the IRS pre-petition levy on the  
9 Debtors' bank account.

## 10 DISCUSSION

### 11 **Applicable Law.**

12 The applicable law in an action for legal malpractice is the law  
13 of the state in which legal services were provided. In re Del-Met  
14 Corp., 322 B.R. 781 (Bankr. M.D. Tenn. 2005). In this case, because  
15 Jacobs provided legal services to the Debtors in California,  
16 California law applies. Under California law, the elements of a  
17 legal malpractice claim are: (1) the existence of a duty; (2) the  
18 breach of the duty; (3) damages; and (4) proximate cause. Lazy Acres  
19 Market, Inc. v. Tseng, 152 Cal. App. 4th 1431 (2007). An attorney  
20 who commits legal malpractice is liable for all damages directly and  
21 proximately caused by his negligence. Ferguson v. Lieff, Cabraser,  
22 Heimann & Bernstein, 30 Cal. 4th 1037, 1045 (2003).

### 23 **Duty and Breach of Duty.**

24 The Debtors retained Jacobs as their bankruptcy counsel in  
25 January 2007. At that point, an attorney-client relationship was  
26 established. See Benninghoff v. Superior Court, 136 Cal. App. 4th

1 61, 72 (2006), (when a party seeks legal advice from an attorney and  
2 the attorney provides that advice, an attorney-client relationship is  
3 established prima facie). From that point on until his motion to  
4 withdraw was granted, Jacobs owed the Debtors a duty to use such  
5 "skill, prudence, and diligence as members of the profession commonly  
6 possess and exercise." Rose v. Hudson, 153 Cal. App. 4th 642, 649-50  
7 (Cal. Ct. App. 2007). This duty included preparing and filing the  
8 required bankruptcy documents promptly and giving the Debtors  
9 competent advice about how to conduct themselves in connection with  
10 the bankruptcy both before and after filing the petition.

11 Jacobs breached this duty in several respects, either personally  
12 or through the agency of his employees. First, he advised them to  
13 stop paying their creditors without cautioning them that this advice  
14 was conditioned on their completing their bankruptcy documents and  
15 filing their bankruptcy within a short period of time. Second, his  
16 office failed to prepare the Debtors' bankruptcy documents promptly  
17 after the Debtors paid the processing fee. Third, when informed that  
18 the Debtors' car had been repossessed, Jacobs' office failed to  
19 schedule an emergency appointment so that Jacobs could obtain its  
20 release. Fourth, even after Jacobs learned of his office's failure  
21 to schedule an emergency appointment, he failed to have his office  
22 prepare the Debtors' bankruptcy documents promptly. This permitted  
23 the IRS to levy on the Debtors' bank account and gave rise to  
24 overdraft charges and phone charges to obtain the release of the  
25 levy.

1           **Proximate Cause and Damages.**

2           The more difficult issues are whether any of these breaches  
3 proximately caused the Debtors' damages. The Court will examine each  
4 of the items of damage claimed by the Debtors to determine whether it  
5 was proximately caused by a breach of Jacobs' duty of care.

6           **Car Repossession Expenses.**

7           The largest element of the Debtors' damages claim is the payment  
8 made from funds borrowed from Mr. Wadley's mother to obtain the  
9 release of their car after it had been repossessed. Based on the  
10 evidence presented at trial, as recited above, the Court concludes  
11 that Jacobs' delay in preparing and filing the bankruptcy petition  
12 for the Debtors was not the proximate cause of this alleged element  
13 of damages.

14           It was not unreasonable, absent knowledge of an emergency, for  
15 Jacobs' office to take two weeks to prepare the bankruptcy documents.  
16 The car was repossessed exactly two weeks after the Debtors were  
17 promised that the papers would be ready. Although Jacobs' office had  
18 not yet started preparing the documents on the day the car was  
19 repossessed, even if the papers had been completed by then and the  
20 Debtors had signed them, more likely than not, the bankruptcy  
21 petition would not have been filed until the following day.

22           Jacobs' negligent advice to stop paying creditors without regard  
23 to when the bankruptcy processing fee was paid may have been the  
24 proximate cause of the repossession. However, given the Debtors'  
25 testimony that they delayed going forward with the bankruptcy so as  
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1 to save money for the processing fee, it is just as likely that they  
2 stopped paying their car creditor due to lack of funds.

3 In any event, the Debtors failed to establish the amount of any  
4 monetary damages that resulted from the repossession. The funds  
5 borrowed from Mr. Wadley's mother were used to pay off their debt to  
6 the car creditor. Although they now owe a debt for the loan to Mr.  
7 Wadley's mother, they no longer owe the debt to the car creditor.  
8 Jacobs' negligent failure to schedule an emergency appointment so as  
9 to obtain a prompt release of the car would have eliminated their  
10 need to borrow the funds. However, they then still would have owed  
11 the debt on the car. Thus, they are no worse off than they were  
12 before.

#### 13 **State Tax Refund.**

14 The second largest element of the Debtors' damages claim is the  
15 amount of the State Tax Refund levied upon or offset by the IRS.  
16 Jacobs' delay in preparing the Debtors' bankruptcy documents was not  
17 the cause of this event which occurred post-petition. The levy may  
18 have been wrongful, and Jacobs' efforts to obtain its release may  
19 have been inadequate and constituted malpractice. However, the  
20 Debtors failed to establish this element of their claim.

#### 21 **Phone Calls to the IRS.**

22 The Debtors also claim \$300 in damages for the cost of phone  
23 calls made on Mr. Wadley's cellular phone from Jacobs' office to the  
24 IRS to obtain the release of the levy on the Debtors' bank account.  
25 The Court finds and concludes that Jacobs' negligent delay in filing  
26 the Debtors' bankruptcy petition was the proximate cause of this

1 element of damages. Jacobs has not contested that the charges were  
2 actually incurred or the amount of the damages claimed. Thus, the  
3 Debtors are entitled to judgment for this amount.

4 **Overdraft Charges.**

5 For the same reason, the Court concludes that the Debtors are  
6 entitled to judgment for the \$243.00 in overdraft charges incurred as  
7 a result of the IRS levy on their bank account. Although Mr. Wadley  
8 testified that the IRS released the levy because he was able to  
9 convince them that it had been made by mistake, the Court is  
10 persuaded that it is more probable than not that the mistake would  
11 not have been made had the Debtors been able to file for bankruptcy  
12 more promptly.

13 **CONCLUSION**

14 Jacobs committed legal malpractice by negligently delaying the  
15 filing of the Debtors' bankruptcy petition. Jacobs' negligence  
16 caused the Debtors to incur damages in the amount of \$543.00.  
17 Judgment will be entered for Plaintiffs in this amount.

18 **END OF DOCUMENT**

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COURT SERVICE LIST

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